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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949

No. 432

NATIONAL LABOR RELATIONS BOARD, PETITIONER

vs.

WILSON & CO., INC., RESPONDENT

BRIEF OF RESPONDENT IN OPPOSITION TO GRANT OF PETITION FOR WRIT OF CERTIORARI

In accordance with Rule 7, paragraph 3 of the Rules of the Supreme Court of the United States and within the extended time allowed by this Court in its telegram dated November 30 and its Order of even date, extending the time in which to file Respondent's Brief to December 30, 1949, Respondent, Wilson & Co., Inc., files this, its Brief in Opposition to Grant of the Writ and asserts the following:

1. This Court is without jurisdiction to hear or decide any cases on certiorari, where the sole purpose of the petition for the writ of certiorari is to seek chastisement, castigation, admonishment and reprimand upon the Judges of the Court of Appeals

for the Fifth Circuit with respect to their handling of labor cases generally or in anticipation of N.L.R.B. cases that may come before that Court in the future.

2. The charges made by the Board are groundless in law and without foundation in fact. Such charges are not in accordance with the spirit of Canon Number One of the Canons of Professional Ethics.

3. By the Board's own admission, the instant case is not one which involves matters of general public interest nor is it one on which a petition for a writ of certiorari ordinarily would lie. The instant case should not be treated jointly with any other case but should be treated separately and individually upon its own merits.

4. The failure of the Board to notify Respondent of the Board's intention to seek more time in which to file a petition for a writ of certiorari; and the failure of the Board to notify Respondent of the grant of additional time, is, at the very least, an utter disregard for the spirit of the rules of this Court, and a failure to abide by the customary and recognized courtesies, ethics and practices sufficient to give this Court grounds for denial of the petition.

5. The Board has ignored many legal issues raised before the lower court by the Respondent, any one or a combination of which were sufficient grounds for the Fifth Circuit Court of Appeals to set aside the Board's order.

I.

THE COURT HAS NO JURISDICTION FOR THE PURPOSES ADVANCED BY THE BOARD.

Under point No. 1 in the Board's petition in the instant case, (Pet. page 12), the Board incorporates by reference, its petition in the case of the *National Labor Relations Board* vs. *Atlanta Metallic Casket Company*, No. 431. In the *Atlanta Metallic* case the Board sets forth its reason for seeking the writ. The Board, however, admits in its petition in the *Atlanta Metallic* case that this case is not one of general importance, nor one that of itself warrants the application for a writ of certiorari. The Board has stated in its petition:

> "A resolution of this issue depends upon the particular facts of each case and hence no question of general importance in the administration of the Act is presented." (Pet. No. 431, P. 16).
>
> "Nevertheless this is not the type of case which, were it to be considered in isolation, the Board would normally regard as of sufficient public importance to warrant an application for a writ of certiorari to review the refusal of the court below to enforce the Board's Order." (Pet. No. 431, p. 10).

Although the Board has stated that these cases are not of sufficient general importance in the administration of the Act to warrant the application for a writ, they nevertheless proceed with their statement that:

"These applications are being made because

> the Fifth Circuit has denied enforcement of or modified Board orders in an inordinately number of cases which have recently been before that Court or petitions for enforcement of Board orders, and because this experience bodes ill for the large number of Board cases now pending in the area over which the court below has jurisdiction." (Pet. No. 431, p. 11).

The Board thus has made it very clear that the sole purpose of filing these petitions for writs of certiorari is to request this Court to admonish and reprimand the Judges of the Court of Appeals for the Fifth Circuit with respect to their handling of labor cases during the past few years. The Board also states as its reason for filing the petitions, that they desire the Judges for the Fifth Circuit to be instructed by this Court to be more generous to the Board in their treatment of cases which the Board brings before them. In other words, what the Board now seeks is to have this Court instruct a lower court on the methods it should use in deciding labor cases, not only in the past, but also any such cases that may come before that lower court in the future.

The Supreme Court is not the proper forum for the determination of the charges made by the Board against the Judges of the Fifth Circuit Court of Appeals in the *Atlanta Metallic* case in its treatment of Point Number 1 (Pet. No. 431, pp. 10-23). If such charges should in fact be brought, they should be brought on impeachment proceedings before the House of Representatives and the Senate

of the United States. The Board charges that the Judges of the Court of Appeals for the Fifth Circuit are deliberately refusing to weigh the requirements of the statutes and are intentionally failing to perform their sworn duties as Judges of a Court of the United States. By its own admission, the Board does not seek review of the individual cases, but merely seeks a castigation and chastisement of the Judges for the Fifth Circuit, which is not justified.

II.

THE CHARGES MADE BY THE BOARD ARE GROUNDLESS AND CONTRARY TO LEGAL ETHICS.

The Board states in its petition that the primary issue in the instant case on appeal to the United States Court of Appeals for the Fifth Circuit was whether the Board's findings are supported by substantial evidence. The Board also states in its brief that the Respondent injected other issues of a minor nature before the Court below. The brief below, of the Respondent, Wilson & Co., Inc., has been filed with the Clerk of this Court and Respondent respectfully refers the Court to this brief. A great many other issues of a legal nature were raised, any one of which or combination were sufficient to set aside the findings of the Board. Likewise the Board in its statement of facts in the instant case has not fully stated the facts, which omissions would tend to mislead the Court. Reference to Respondent's brief below point up these omissions.

Apart and aside from the groundlessness of the charges against the Judges for the Fifth Circuit, it is the opinion of Respondent and its attorneys that such charges made by attorneys against judges do not seem to be in accordance with the duties and spirit of the language of Canon No. 1 of the Canons of Professional Ethics. Canon No. 1 states as follows:

> "It is the duty of the lawyer to maintain towards the courts a respectful attitude not for the sake of the temporary incumbent of the judicial office but for the maintenance of its supreme importance. Judges, not being wholly free to defend themselves are peculiarly entitled to receive the support of the Bar against unjust criticism and clamor. Whenever there is a proper ground for serious complaint of a judicial officer, it is the right and duty of the lawyer to submit his grievances to the proper authorities. In such cases, but not otherwise, such charges should be encouraged and the person making them should be protected."

The obligation which an attorney assumes when admitted to the Bar is not merely to be obedient to the constitution and the law, but to maintain at all times, the respect to the courts of justice and the judicial officers. (*Neil* v. *State*, 9 Arkansas 259). The habit of criticizing the motives of the judicial officers in the performance of their official duties, when the proceedings are not against the officers whose acts or motives are criticized, tends to sub-

vert the confidence of the community in the courts of justice and in the administration of justice. When such charges are made by an attorney, who is an officer of the court, and who is bound by his duty to protect the administration of justice, the attorney making such charges is guilty of professional misconduct. (*Matter of Rockmore*, 127 App. Div. 499, 111 N.Y.S. 879). The mere raising of charges of this kind in a proceeding of this type should be sufficient grounds for denial of the writ of certiorari in the instant case.

III.

THE INSTANT CASE INVOLVES NO MATTER OF GENERAL PUBLIC INTEREST OR IMPORTANCE.

By the Board's own admission, the instant case is not one which involves matters of general public interest, nor is it one on which a petition for writ of certiorari would ordinarily lie. Respondent concurs with the Board in these statements. This admission by the Board is sufficient grounds for a denial of the writ by this Court.

Respondent objects to any attempt by the Board to tie in the instant case with any other cases and submits that on the basis of statements made by the Board in its petition, that, standing alone, the instant case is not of sufficient general importance to warrant the grant of a writ. Respondent submits that each case should be decided upon its own merits and should not be tied in with other cases for purposes not within the jurisdiction of this

Court. Respondent can reach only one conclusion as to the reasons for the Board's attempt to tie in this case with four other cases, in petitioning for a writ of certiorari. That reason can be only that they hope to add weight to their arguments by pure numbers, concerning the decisions rendered by the Court of Appeals for the Fifth Circuit in labor cases.

IV.

FAILURE OF THE BOARD TO NOTIFY RESPONDENT OF EXTENSION OF TIME FOR FILING PETITION IS IMPROPER

The final order in the United States Court of Appeals for the Fifth Circuit was entered on May 30, 1949 when the Board's petition for rehearing was denied. On August 26, according to the petition in the instant case, the Chief Justice granted the Board until October 28, 1949 within which to file its petition for a writ of certiorari. Respondent was not apprised of this fact, nor that a petition had been filed until it read a release in a daily labor service. No formal notification was given Respondent before the petition was filed. The petition herein was received on November 7, 1949.

Respondent submits that the failure of the Board to notify Respondent of its intention to apply for a writ of certiorari and for more time in which to file its petition and the further failure of the Board to notify Respondent of the granting of additional time, is an utter disregard by the Board of the spirit of the rules of this Court, and a failure to

abide by the customary and recognized courtesies, ethics and practices among attorneys. This, in itself, furnishes sufficient grounds for this Court to deny the application for a writ of certiorari.

V.

THE BOARD HAS IGNORED MANY LEGAL ISSUES RAISED IN THE LOWER COURT

In the petition in the instant case, the Board, at pages 12-16, attempts to minimize all the legal issues which were brought before the Court of Appeals and which furnished the basis for denying enforcement of the Board's decision. Among the issues omitted were the following:

1. Was there sufficient evidence to support the Board's finding on the record as a whole?

2. Was the Bender letter of June 26, 1946 a refusal to bargain? (T. 112-113).

3. Was the Respondent under any duty to bargain with the union concerning the Baugh incident, and did its refusal to talk about this incident after the strike started, convert the strike into an unfair labor practice strike?

4. Since there was no unconditional offer to return to work, did the union lose its majority status by the replacement of the former employees? Did the Company then have any duty to bargain?

5. Was the Trial Examiner biased and prejudiced?

6. Was there any violation of Section 8(a)(1)

of the Act due to certain isolated alleged acts by the Company and its agents?

7. If there were violations of Section 8(a)(1) of the Act, did these violations cause or prolong the strike, thereby turning the strike into an unfair labor practice strike?

8. Was the unit found by the Board an appropriate unit?

9. Did the union request the Respondent to bargain?

10. Was the strike on June 23, 1946, protected as a concerted activity?

Each of these legal questions was raised before the Court of Appeals. A determination of these questions in favor of Respondent, either in part or completely, were sufficient to set aside the Board's findings.

CONCLUSION

For reasons stated herein, Respondent respectfully urges that the writ be denied.

Respectfully submitted,

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Dated: DECEMBER 27, 1949.